

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219021 **DATE:** September 20, 1985
MATTER OF: American Sterilizer Company

DIGEST:

1. Protest is sustained where the contracting agency concedes that the awardee's bid for an "equal" product should have been rejected as nonresponsive for failing to meet precise dimensions specified in a brand name or equal purchase description. Where solicitation includes precise performance or design characteristics, "equal" product must meet them exactly, and mere functional equivalency will not do.
2. When, in view of the extent of performance and need for interchangeability, it is not feasible for an agency to terminate an improperly awarded contract for the convenience of the government, the protester is entitled to recover both its bid preparation costs and its costs of filing and pursuing the protest at the General Accounting Office.

American Sterilizer Company protests the award of a contract to Space Designs, Inc., under invitation for bids (IFB) No. 640-30-85, issued by the Veterans Administration Medical Center, Palo Alto, California.

On July 19, 1985, while American Sterilizer's protest was pending in our Office, the company filed a complaint seeking injunctive and declaratory relief in the United States District Court for the District of Columbia. See American Sterilizer Co. v. Harry N. Walters, Civil Action No. 85-2310. This decision responds to the court's request for our advisory opinion.

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We sustain the protest, but do not find it in the best interest of the government to recommend termination of the contract. We find, however, that American Sterilizer is entitled to recover its reasonable costs of bid preparation and of filing and pursuing its protest at our Office.

The IFB solicited bids for modular units to be used for the storage and handling of medical supplies, equipment, and linens. The specifications called for the "Unicell System," manufactured by American Sterilizer, or equal. Precise exterior dimensions, based on Unicell specifications, were included for various line items including the overall modules and mobile storage and work units. Space Designs offered units manufactured by the Herman Miller Company at a total price of \$296,052.18, while American Sterilizer offered its Unicell System at \$350,285.53. The contracting officer awarded the contract to Space Designs on April 22, 1985, after concluding that the Herman Miller-built units were "equal" to the Unicell System. American Sterilizer disagreed with this finding and protested to the agency and then to our Office, arguing that because the units provided substantially less storage capacity, they did not conform to the salient characteristics of the brand name system, and Space Designs' bid therefore should have been rejected as nonresponsive. (The protester also alleged that certain units are not molded in one piece and lack "stops" to prevent drawers from being pulled too far out. These allegations, however, are not repeated in the complaint filed with the District Court.)

In its report to our Office, the VA concedes that in the absence of any other listed salient characteristics, the specific dimensions of the storage units must be regarded as such. It also concedes that the Herman Miller-built units are smaller than those specified. The agency therefore agrees that it should have rejected Space Designs' bid as nonresponsive. However, although the agency issued a stop work order on June 12, Space Designs has already made an initial shipment that constitutes more than 50 percent of the contract. In addition, after discussions with Space Designs, the agency estimates that termination costs might run as high as \$57,400. The VA concludes, therefore, that termination for convenience, at this stage of performance, would not be practicable or in the best interest of the government. As an alternative, the agency offers to reimburse American Sterilizer for its bid preparation costs.

American Sterilizer, however, believes that the VA offer is inadequate. In the protester's opinion, the agency has violated the procurement statutes and regulations, improperly deprived American Sterilizer of an award, and compromised the integrity of the federal procurement system. It urges that the agency find the awardee in default on the grounds that Space Designs has delivered goods that do not comply with specifications. According to the protester, this would allow the agency to return the noncompliant storage units to Space Designs, at Space Designs' expense, and then award a contract to American Sterilizer.

If termination for default is not deemed appropriate, then American Sterilizer urges that the VA terminate Space Designs' contract for the convenience of the government, again returning the noncompliant storage units to Space Designs and awarding a contract to American Sterilizer. Since the storage units are off-the-shelf items, the protester believes that the expense to the government of a termination for convenience will be limited to the costs of shipment, approximately \$4,860.

At the outset, we agree with the VA's conclusion that Space Designs' bid should have been rejected as nonresponsive. When, in a brand name or equal purchase description, an agency expresses its requirements in terms of very precise performance or design characteristics, any "equal" product must meet those characteristics exactly. See Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207, and cases cited therein. Since the VA used this type of specification, mere functional equivalency of the "equal" storage units offered by Space Designs was not sufficient, and it was improper for the contracting officer to accept the bid. We therefore must determine what corrective action, if any, is possible at this time.

Whether a contract should be terminated for default is a matter cognizable by the contracting officer, not our Office. We point out, however, that it is not clear that the agency could find the awardee in default, as American Sterilizer urges, since it accepted Space Designs' bid and has since accepted units delivered under the contract. By doing so, the VA arguably has waived or modified the specifications. Cf. Astubeco, Inc., Armed Services Board of Contract Appeals Nos. 8,727, 9,084, Oct. 31, 1963, reprinted in 1963 BCA ¶ 3,941 (CCH 1963) (action under default clause is no longer available to government when defective goods have been accepted and paid for).

As for termination for the convenience of the government, in determining whether to recommend such action, we consider, among other things, the seriousness of the procurement deficiency, the degree of prejudice to other bidders or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of termination on the procuring agency's mission. Vulcan Engineering Co.--Request for Reconsideration, B-214595.2, Feb. 27, 1985, 85-1 CPD ¶ 243.

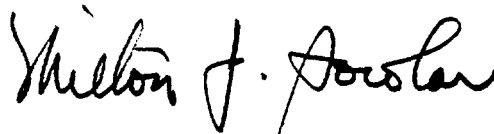
After reviewing the facts of this case, we do not believe that it is in the best interest of the government to recommend termination. As stated above, more than 50 percent of the storage units have already been delivered to the VA. In our opinion, the cost to the government of reprocurring less than half the original requirement is likely to be disproportionate in relation to the seriousness of the contracting agency's error. Although the Herman Miller-built storage units do not meet all the salient characteristics set forth in the IFB, the agency concedes that they satisfy its minimum needs. In addition, since the contracting officer's report stresses that the VA seeks interchangeability of shelves, drawers, and accessories, it appears that delivery of the remaining Herman Miller-built units under the contract is necessary to meet this objective. Finally, even though the contracting officer wrongly concluded that the Herman Miller units were equal to American Sterilizer's Unicell System, there is no evidence that he acted in bad faith when he made this determination. Viewed as a whole, then, we do not believe that the facts of this case justify the added costs and administrative inconvenience that are likely to result from a recommendation that Space Designs' contract be terminated for the convenience of the government.

In its court suit, the protester also seeks attorney's fees and bid preparation costs. Our Bid Protest Regulations provide that when an award is contrary to statute or regulation, protesters may recover reasonable costs of (1) filing and pursuing a protest, including attorney's fees, and (2) preparing a bid or proposal. 4 C.F.R. § 21.6(d) (1985). The former are recoverable when the agency has unreasonably excluded the protester from a procurement unless, pursuant to our recommendation, the protester has received an award; the latter are recoverable when the agency has unreasonably excluded the protester from a procurement and other remedies are not appropriate. Id. § 21.6(e)

Since we have found that it is not feasible to recommend any corrective action, and since American Sterilizer's case otherwise falls within the ambit of our Bid Protest Regulations, we find that the protester is entitled to reasonable bid preparation costs and the costs of filing and pursuing the protest at our Office. Should the court find that some other remedy is appropriate, recovery of these costs would, of course, not be appropriate.

For the VA's guidance in future procurements, we point out that it appears the agency's requirement for the Unicell System or equal was unduly restrictive of competition. Although with less capacity than the Unicell System and apparently bonded, rather than molded in one piece, and without drawer and tray stops, the Herman Miller-built units delivered by Space Designs admittedly satisfy the VA's needs for storage units. This means, therefore, that the specifications did not accurately reflect the agency's minimum needs. In any similar procurement, the agency should use more carefully drafted specifications, and any salient characteristics should be clearly identified and distinguished from features of the brand name equipment that are merely desirable.

The protest is sustained.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive, flowing style with a large, prominent "M" and "F".

Acting Comptroller General
of the United States